Supreme Court, U.S.
FILED
SEP 10 2003
OFFICE OF THE CLERK

No. 02-626

In the

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

v.

MICCOSUKEE TRIBE OF INDIANS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER

FRANK A. SHEPHERD
ALICIA L. RAUSE
Pacific Legal Foundation
1320 South Dixie Highway,
Suite 1105
Coral Gables, Florida 33146
Telephone: (305) 667-1677
Facsimile: (305) 667-7773

ROBIN L. RIVETT
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Whether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an "addition" of a pollutant "from" a point source triggering the need for a National Pollutant Discharge Elimination System permit under the Clean Water Act.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

STATEMENT OF FACTS 3

SUMMARY OF ARGUMENT 4

ARGUMENT 6

PETITIONER'S PUMPING OF NONPOINT SOURCE GENERATED WATER FROM ONE SIDE TO THE OTHER SIDE OF A LEVEE THAT DIVIDES A NATURAL WATER BODY DOES NOT TRIGGER THE NEED FOR AN NPDES PERMIT UNDER THE CLEAN WATER ACT 6

A. The Eleventh Circuit's Decision Ignores Express Provisions of the Clean Water Act and Eschews the Principles of Federalism Embodied in the Clean Water Act by Stripping States of Their Land Use and Water Resources Planning Responsibilities 6

B. The South Florida Water Management District's Flood Protection System for Broward County Does Not *Add* a Pollutant to Navigable Waters But Instead Redirects Nonpoint Source, State Managed Runoff Throughout a Single Watershed 11

CONCLUSION 15

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases

Appalachian Power Company v. Train, 545 F.2d 1351 (4th Cir. 1976) 13

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 8

Borden Ranch Partnership v. United States Army Corps of Engineers, 537 U.S. 99 (2002) 1

California v. United States, 438 U.S. 645 (1978) 9

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 14

Committee To Save Mokelumne River v. East Bay Municipal Utility District, 13 F.3d 305 (9th Cir. 1993) 14

Dubois v. United States Department of Agriculture, 102 F.3d 1273 (1st Cir. 1996) 14

Environmental Protection Agency v. California ex rel. State Water Resources Control Board, 426 U.S. 200 (1976) 8

ETSI Pipeline Project v. Missouri, 484 U.S. 495 (1988) 10

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) 1

Froebel v. Meyer, 217 F.3d 928 (7th Cir. 2000) 14

Hanousek v. United States, 528 U.S. 1102 (2000) 1

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 1

TABLE OF AUTHORITIES—Continued

Page

Miccosukee Tribe of Indians of Florida v. South Florida Water Management District, 280 F.3d 1364 (11th Cir. 2002) 3-4

National Wildlife Federation v. Consumers Power Company, 862 F.2d 580 (6th Cir. 1988) 12-13

National Wildlife Federation v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 12

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 1, 10-11

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979) 6

United States v. Lopez, 514 U.S. 549 (1995) 10

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 1

Statutes

33 U.S.C. § 1251(b) 10, 15

§ 1288 7-8

§ 1311 ..... 8, 11

§ 1311(a) 12

§ 1311(b) 8

§ 1311(c) 8

§ 1313(d) 7, 9

§ 1313(d)(3) 9

§ 1313(e) 9

TABLE OF AUTHORITIES—Continued

Page

§ 1314(f) 4, 7

§ 1314(f)(2)(F) 4

§ 1329 7-8

§ 1329(a) 9

§ 1329(b) 9

§ 1329(h) 9

§ 1342 4

§ 1362(12) 12

§ 1362(14) 6-7

§ 1288 7

Fla. Stat. § 373.4592 (2003) 15

§ 373.4595 (2003) 11

§ 403.0885 (2003) 8

Supreme Court Rules

Rule 37.3(a) 1

37.6 1

Miscellaneous

Bartfeld, Esther, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl. L. 43 (1993) 6

Leshy, John D., *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from Inside*, 25 Envtl. L. 679 (1995) 8

TABLE OF AUTHORITIES—Continued

Page

Vergura, Jim & Jones, Ron, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317 (2001) 9

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Petitioner. Written consent for amicus participation in this case was granted by counsel of record for all parties and has been lodged with the Clerk of the Court.[1]

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Coral Gables, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated as amicus curiae in numerous cases before this Court concerning the statutory interpretation and constitutional application of a variety of federal environmental statutes including the Clean Water Act (CWA). For example, PLF participated as amicus curiae in *Borden Ranch Partnership v. United States Army Corps of Engineers*, 537 U.S. 99 (2002); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000); *Hanousek v. United States*, 528 U.S. 1102 (2000); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).

---

[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF seeks to augment the arguments of Petitioner by providing additional perspective and background on the regulatory scheme that is the subject of this case. For over 30 years, PLF attorneys have represented numerous parties from agricultural, home building, forestry, and related industries who must comply with the point source and nonpoint source permitting provisions of the Clean Water Act. For example, PLF attorneys currently represent the Hawaii Farm Bureau Federation in litigation brought under state law to stop interbasin water transfers needed by their members for crop irrigation. This case raises the possibility that unless the Eleventh Circuit's decision is reversed, water resources planning including flood control and water diversion programs, like the Hawaii program mentioned above, will no longer be the prerogative of state and local discretion, but instead will be the subject of federal oversight and intervention. This intervention may even lead to these programs only being able to operate if they build and operate very expensive water treatment systems. Such an interpretation of the CWA will have tremendous negative impacts on agriculture, home building, forestry, and related industries and is directly contrary to the cooperative federalist approach to clean water planning that forms the underlying premise of the CWA.

INTRODUCTION

This case will affect municipalities, flood control agencies, water districts, dam operators, and all other local entities that have the responsibility to plan land uses and manage water resources for the benefit and protection of the public. Must these local entities obtain restrictive, *federally* controlled Clean Water Act pollutant discharge permits in order to do their jobs? A careful look at the CWA shows that Congress never intended the federal government to take control of these vital land use planning and water management responsibilities from state and local entities. Nevertheless, the Eleventh Circuit's decision in this case says these entities must submit to federal control by

first obtaining federal pollutant discharge permits. That decision is wrong and should be overturned.

STATEMENT OF FACTS

This case arose in a challenge to the South Florida Water Management District's (District) operation of the Central and Southern Florida Flood Control Project (Project).[2] As part of the Project, the District manages the flow of water across the Lake Okeechobee watershed[3] to keep some areas from flooding and ensure other areas receive adequate water supplies. At issue in this case are the areas now called the C-11 Basin and Water Conservation Area - 3A (WCA-3A). Both were originally part of one large water body and are part of the Everglades. The C-11 basin, home to the 48,000-acre, heavily populated and farmed Western Broward County, is now separated from the 491,000-acre, WCA-3A water conservation area by two levees known as L-33 and L-37. The purpose of this separation is to allow a ditch, known as the C-11 Canal, to help drain the western portion of Broward County westward into WCA-3A. *See Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 1366 (11th Cir. 2002). The S-9 pump station pumps this water out of the C-11 basin through three pipes that run from the C-11 Canal through the L-33 and L-37 levees into WCA-3A. *Id.*

The movement of water collected by the C-11 Canal to WCA-3A is the subject of this lawsuit. The water collected on the east side of L-33 and L-37, the C-11 Basin side, has a higher

---

[2] This Project involves 391 water diversion structures consisting of pumping stations incorporated with 1,800 miles of canals and levees. Petition for a Writ of Certiorari (Pet.) at 4; http://www.sfwmd.gov/histo/2_history.html at 1 (last visited Sept. 3, 2003). The Project controls water flow over 17,930-square miles of land in Florida. *Id.*

[3] The Lake Okeechobee watershed consists of a 16 county area from Orlando to Key West.

phosphorous content than the west side, the WCA-3A side. Despite this activity being part of an "eight billion-dollar joint federal and state effort . . . to restore the everglades while accommodating the region's competing urban and agricultural interests," Pet. at 9, Plaintiffs challenged the water diversion activities of S-9 as operating illegally because the District did not have a federally approved CWA National Pollutant Discharge Elimination System (NPDES) permit. 33 U.S.C. § 1342. *See Miccosukee*, 280 F.3d at 1367. The district court and the Eleventh Circuit Court of Appeals agreed with Plaintiffs, essentially federalizing the management of local surface water flows and the local land uses that accompany such management in contradiction of the language and intent of the CWA. *See* 33 U.S.C. § 1314(f)(2)(F).

As a result, state and regional water management agencies, local water districts, municipalities, dam operators, agricultural operations, and any other entity concerned with the necessary movement of water for flood control and water management purposes, face the sobering prospect, just like the District, of having to get a costly, highly restrictive, federally mandated NPDES permit to operate. This was never intended by the CWA.

SUMMARY OF ARGUMENT

The Eleventh Circuit's decision requires a state agency that is diverting flood water containing phosphorous generated from agricultural and other land use activities to obtain a federal NPDES permit designed to control discharges from *point* sources. This decision is wrong. First, the CWA expressly identifies "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities" as nonpoint source land use activities that do not require federal NPDES permits, but are controlled by state authorities. 33 U.S.C. § 1314(f). This decision strips

Florida of its traditional responsibility, expressly recognized in the CWA, to control land use and manage water resources. The District's operation of its S-9 pump is expressly designed to promote municipal and agricultural land uses through the management of the water, yet the Eleventh Circuit's decision arrogates to the federal EPA discretion over land use and water management. Doing so not only violates the CWA, but also raises serious federalism issues.

Second, even if the District's operation of its S-9 pump were considered a point source activity, it is still not subject to NPDES permitting requirements. Because the need for an NPDES permit is only triggered if there is an *addition* of a pollutant from a point source to the nation's waters. The District employs numerous pumping plants and a thousand-mile system of ditches and levees to control water flow across the Everglades' landscape. This system is comprised of dam-like water diversion facilities that only move water from certain locations within one formerly inundated watershed area to other locations within the same watershed, to prevent flooding or supply water. Therefore, facilities *do not* themselves *add* any pollutants to the water, and do not need an NPDES permit.

ARGUMENT

PETITIONER'S PUMPING OF NONPOINT SOURCE GENERATED WATER FROM ONE SIDE TO THE OTHER SIDE OF A LEVEE THAT DIVIDES A NATURAL WATER BODY DOES NOT TRIGGER THE NEED FOR AN NPDES PERMIT UNDER THE CLEAN WATER ACT

A. The Eleventh Circuit's Decision Ignores Express Provisions of the Clean Water Act and Eschews the Principles of Federalism Embodied in the Clean Water Act by Stripping States of Their Land Use and Water Resources Planning Responsibilities

The Clean Water Act seeks to eliminate the discharge of pollutants into navigable waters. In designing the program to accomplish this goal, the Act recognizes two different sources of pollution, point sources and nonpoint sources.[4]

The issue raised by this case is how to treat the simple diversion of agricultural and other nonpoint source runoff from one side of a levee to the other through a pumping station. The Eleventh Circuit treated this diversion as entailing a point source that required an NPDES permit. However, that determination is contrary to express language in the CWA. The

[4] The Clean Water Act defines a point source as "any discernable, confined and discrete conveyance . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). Exempted are agricultural stormwater discharges and irrigated agricultural return flows. *Id.* Nonpoint sources are not defined by the Act, but are considered to be all other sources of pollution that are not regulated under the point source definition. A nonpoint source refers to "runoff caused primarily by rainfall [land use] activities that employ or cause pollutants." *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979). *See also* Esther Bartfeld, *Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings*, 23 Envtl. L. 43, 45 n.6 (1993).

CWA plainly states that any "agricultural stormwater discharges or irrigated agricultural return flows" (agricultural runoff is partly involved here (Brief for Petitioner at 9-10)), are exempt from the NPDES permitting requirements. 33 U.S.C. § 1362(14).

The Act also directs that any other runoff from other nonagricultural land use activities is also not subject to NPDES point source permitting. Specifically, the CWA requires that any pollutants associated with water diversion facilities such as pumping stations are to be managed through the CWA's system for controlling nonpoint source rather than point source pollution. In 33 U.S.C. § 1314(f), Congress instructed the EPA administrator to provide guidelines and information to states for identifying

> (1) . . . the nature and extent of *nonpoint sources* of pollutants, and (2) processes . . . from
>
> . . . .
>
> (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Emphasis added.

Thus, water management and flow diversion facilities such as pumping stations that divert water affected by nonpoint source pollutants, should not to be treated like industrial or municipal polluters which must obtain NPDES permits requiring expensive technology to limit effluent outflows. Rather, pumping stations and like facilities should be subject only to state and locally controlled nonpoint source management methods of pollution control. *See* 33 U.S.C. §§ 1288, 1329, 1313(d).

This conclusion is supported by the overall structure and strategy employed by the CWA. "The Clean Water Act anticipates a partnership between the states and the federal government animated by a shared objective: to 'restore and maintain the chemical, physical, and biological integrity of the Nations's waters.' 33 U.S.C. § 1251(a)." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

Under the Act, a point source discharger of a pollutant into the nation's waters is generally required to obtain an NPDES permit in order to operate legally. 33 U.S.C. § 1311. This federally mandated permit was established principally for municipal and industrial wastewater outflows and was designed to get toxins out of the water. 33 U.S.C. § 1311(b), (c); *see Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 (1976). Many states including Florida administer the NPDES permitting program, but only with federal EPA oversight. Fla. Stat. § 403.0885 (2003).

The CWA addressed control of nonpoint source pollution in a completely different fashion because such pollution is not readily attributable to easily identifiable points of entry. Congress understood that nonpoint source pollution was the product of land uses and land use practices which could not be managed by federal fiat. After all, "direct federal regulation of local land use excites powerful opposition, partly because there is little tradition of doing so." John D. Leshy, *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from Inside*, 25 Envtl. L. 679, 682 (1995). Accordingly, Congress opted to embrace an approach in cooperative federalism giving *states* the authority and responsibility to manage nonpoint source pollution. States are to develop areawide waste treatment management plans, 33 U.S.C. § 1288, that direct adjustments in local land use practices and other local behaviors that cause nonpoint source pollution. Section 319 of the Act, 33 U.S.C. § 1329,

encourages states to identify best management practices to reduce pollutant loading and employ them in establishing their management programs for water bodies to achieve water quality standards developed by the states. 33 U.S.C. § 1329(a), (b). Section 319 also supports development of state management plans through a federal grant program to the states. 33 U.S.C. § 1329(h).

Nonpoint source pollution is also addressed in section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), under which *states* are authorized to

> 1) identify waters that are and will remain polluted [even] after the application of technology standards (i.e., the NPDES program), 2) prioritize the waters, taking into account the severity of their pollution, and 3) establish total maximum daily loads [TMDLs or amounts of pollutants] for the waters at levels necessary to meet applicable water quality standards.

Jim Vergura & Ron Jones, *The TMDL Program: Land Use and Other Implications*, 6 Drake J. Agric. L. 317, 320 (2001) (footnotes omitted). The state is then to incorporate its list of impaired water bodies and TMDLs into its continuing clean water planning process. 33 U.S.C. § 1313(d)(3), (e). Through this planning process, the states are given complete authority over how to direct their land and water resource activities to meet water quality goals. In this way, the states are still the masters of their local land and water use decisions, a principle to which the federal government has long deferred, *California v. United States*, 438 U.S. 645, 653 (1978), but the states are also partners with the federal government in a mutual effort to provide clean waters in our nation.

Flood control and water diversion activities are traditionally performed by the states for the purpose of facilitating appropriate land uses. But if EPA has the authority to control flood protection strategies, as well as other water

supply and management strategies (e.g., irrigation flow) through its NPDES permitting authority, the state will lose its traditional land use planning role. This was never contemplated by the CWA. In fact, just the opposite is evident as "[r]ather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .' 33 U.S.C. § 1251(b)." *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (*SWANCC*). *See ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 503 (1988) (Congress espoused even earlier in the Flood Control Act of 1944 a policy of "recogniz[ing] the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control.").

This Court has recognized that the Constitution established a federal government of enumerated powers which are few and defined in contrast to the powers of the states which are numerous and indefinite. *See United States v. Lopez*, 514 U.S. 549, 552 (1995). This limitation on federal authority was necessary, this Court has emphasized, to ensure our fundamental liberties and protect the nation against unfettered federal power and a "completely centralized government." *Id.* at 552-55. It follows that the EPA may not shift this balance of power by the simple expedient of asserting federal authority over local water diversion and flood control activities that Congress declined to provide.

The language and structure of the CWA demonstrate that Congress did not intend for EPA to control how states would manage the diversion of water for flood control and water supply purposes. The Eleventh Circuit's interpretation of the CWA that water diversion facilities like S-9 pumping stations do require federal, EPA-directed NPDES permits, results in that

very control which "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. The Eleventh Circuit's holding should be reversed.

B. The South Florida Water Management District's Flood Protection System for Broward County Does Not *Add* a Pollutant to Navigable Waters But Instead Redirects Nonpoint Source, State Managed Runoff Throughout a Single Watershed

The Eleventh Circuit ruled that the District must adhere to federal permit mandates before it can legally protect Broward County from flooding caused by local land use activities by pumping water from one side of the levee to the other. However, the operation of such a water diversion/flood protection system does not "add" pollutants to the waters of the United States, which is the federal NPDES permit trigger.

Under the CWA, unless exempted, no one may discharge a pollutant from a point source into navigable waters without first obtaining a federal NPDES permit. 33 U.S.C. § 1311. The CWA specifically defines "discharge of a pollutant" as "any addition of any pollutant" to navigable water from any point source. The question for this Court to decide is whether pumping phosphorous enriched runoff from the east side of the L-33 and L-37 levees to the west side, both sides being integral parts of the same watershed and hydrological system,[5] constitutes the "addition" of a pollutant to the waters of the United States. The best interpretation of what Congress intended by the term "addition" would not lead to the federal government gaining indirect control over land use

---

[5] "The Lake Okeechobee watershed [is] an immense, integrated and unique system of hydrologically connected lakes, rivers, bays and surface waters. . . . Fla. Stat. § 373.4595 (2003). Within this watershed lie populous municipalities, vast agricultural communities, and precious resources, including Florida's Everglades." Pet. at 8-9.

decisionmaking, yet the Eleventh Circuit's decision has done just that. This Court should be guided in its analysis by other federal Circuits holding that passing water through a dam-like facility such as levees, from one part of a water body to another part, does not *add* a pollutant to the water. It merely redistributes it within that water body.

In *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), the court addressed whether "certain dam-induced water quality changes," *id.* at 161, constitute the "discharge of a pollutant." *Id.* Specifically, by damming streams, reservoirs are created upstream to prevent flooding and moderating water flow. Damming can have unintended negative effects like collecting pollutants such as sediment, dissolved minerals, and nutrients which, when released downstream through the piping system of a dam's structure, can change the quality of the water on the other side of the dam. Faced with the question of whether such an operational activity of dams involves "the discharge of any pollutant," 33 U.S.C. § 1311(a), because it causes the "*addition* of [a] pollutant to navigable waters," 33 U.S.C. § 1362(12) (emphasis added), the court accepted EPA's reasoning that "the . . . character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river)." 693 F.2d at 175. Significantly, as with the instant case, the water on one side of the dam and that on the other side of the dam is all part of one contiguous, connected water body that is merely faced with a redistribution of the already existing pollutants.

In *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (6th Cir. 1988), the court considered whether an NPDES permit was required for the operation of a hydroelectric facility that pumps water out of Lake Michigan uphill to a man-made reservoir from which the water is later released downhill through huge penstocks to turn electricity

generating turbines, only to be once again pumped back up the hill and into the Lake. In the process of pumping the lake water up to the reservoir, fish were pumped up also. When the water and fish were later dropped back through the penstocks and through the turbines, not only the water, but "entrained fish (live and dead fish, and fish remains)," *id.* at 581, were discharged back into Lake Michigan. Accepting the fact that the fish remains constituted a pollutant, the court was faced with the question of whether their discharge constituted the "addition of a pollutant" requiring an NPDES permit. The court followed the *Gorsuch* precedent finding that because "the fish, both dead and alive, always remain within the [contiguous] waters [above and below the penstocks, they] . . . cannot be added." *Id.* at 586. Thus, "those pollutants already in the water [not added by the dam's operation] moved and transformed by the essential operation of a hydroelectric power dam," *id.*, do not require an NPDES permit. The court found no "addition of a pollutant" where the activity involved the diversion of water between two contiguous water bodies that were originally one and where there was no introduction of a pollutant in the operation of the water diversion facilities. The same situation exists in the instant case.

In *Appalachian Power Company v. Train*, 545 F.2d 1351 (4th Cir. 1976), the court dealt with a challenge to regulations establishing limitations on the discharge of heat from steam driven electricity generating plants into navigable waters. Industry argued the effluent limitations in the regulations created absolute standards that applied regardless of the pollutants in a plant's intake water. *Id.* at 1377. The court agreed that "[t]hose constituents occurring naturally in the waterways or occurring as a result of other industrial discharges, do not constitute an addition of pollutants by a plant through which they pass," *id.*, and accordingly do not constitute a regulable "discharge of a pollutant." *Id.* Thus, the circuit court found that a pollutant not introduced by the operation of

the point source (e.g., dam, hydroelectric facility, water diversion pump and levee complex) did not constitute the discharge or addition of a pollutant subject to an NPDES permit. *See also Froebel v. Meyer*, 217 F.3d 928, 933 (7th Cir. 2000). *See contra Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001); *Dubois v. United States Department of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996); and *Committee to Save Mokelumne River v. East Bay Municipal Utility District*, 13 F.3d 305, 308 (9th Cir. 1993).

The analyses of the District of Columbia, Sixth, Fourth, and Seventh Circuits provide a superior framework and understanding of the critical public policy concerns necessary for deciding this case. Unlike the Eleventh Circuit decision in this case, these circuits' decisions correctly grasp why the diversion within a single watershed of water already tainted by pollutants, not generated by the operation of the water diversion facility but occurring naturally in the water or by virtue of authorized nonpoint source activities, does not constitute an *addition* of a pollutant when diverted into another part of the watershed. Such a conclusion makes perfect sense from the practical viewpoint that diversion facilities are just distributing water, *not adding* anything to it. The conclusion also makes sense because it advances Congress' desire to leave the cleanup of water pollution caused by agriculture and other nonpoint source land use activities to state discretion rather than federal fiat.

CONCLUSION

The District's S-9 facility, permitted under Florida's federally approved Everglades Forever Act[6] as meeting state water quality standards, should not require an NPDES permit. S-9 does not "add" any pollutants to the waters, a prerequisite to an NPDES permit obligation. Rather it merely *diverts* runoff already enriched with phosphorous from agricultural and other nonpoint source, land use activities, through the L-33 and L-37 levees, from one part of the Lake Okeechobee watershed to another. This interpretation of what triggers the need for an NPDES permit should be embraced because it advances the CWA's own policy that the federal government is not to regulate agricultural and other nonpoint source, land use activities. Rather, an explicit objective of Congress in promulgating the CWA was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). The Eleventh Circuit's decision shifts the balance of power over land use planning to the federal

---

[6] Florida's Legislature passed the Everglades Forever Act (EFA) of 1994 to reduce phosphorous levels in water diverted into the Everglades. Fla. Stat. § 373.4592 (2003). The EFA provides among other things a state water quality permitting program designed to improve the quality of runoff entering the Everglades.

authorities, defies Congress' express will, and raises substantial federalism issues.

The decision below should be reversed.

DATED: September, 2003.

Respectfully submitted,

FRANK A. SHEPHERD
ALICIA L. RAUSE
Pacific Legal Foundation
1320 South Dixie Highway,
Suite 1105
Coral Gables, Florida 33146
Telephone: (305) 667-1677
Facsimile: (305) 667-7773

ROBIN L. RIVETT
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae Pacific Legal Foundation